Nos. 77-451, 77-457, 77-551, 77-602

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

MOBIL ALASKA PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, *ET AL.*,
Respondents.

EXXON PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents.

BP PIPELINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents.

ARCO PIPE LINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, DEPARTMENT OF ENERGY AND FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS, THE STATE OF ALASKA AND ARCTIC SLOPE REGIONAL CORPORATION

November 4, 1977

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit in the consolidated proceedings styled *Mobil Alaska*

Pipeline Co. v. United States and Interstate Commerce Commission is reported at 557 F.2d 775 (1977). That decision dismissed petitions seeking judicial review of a June 28, 1977 Order of the Interstate Commerce Commission (ICC) in Investigation and Suspension Docket No. 9164 (Rate Filings) and No. 36611 (Rules and Regulations).[1]

JURISDICTION

The jurisdictional requisites are set forth in the various petitions.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission has the statutory power and authority under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. §15(7), to suspend the initial rates proposed by the carriers for the transportation of crude oil through the Trans Alaska Pipeline System

[1]On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977), and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the functions and regulatory responsibilities of the Interstate Commerce Commission with respect to the establishment of rates and valuations of oil pipelines were transferred to the Federal Energy Regulatory Commission (FERC), which, as an independent Commission within the Department of Energy, was activated on October 1, 1977. The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending on the date the DOE Act takes effect before any department, agency, commission or component thereof, the functions of which are transferred by the DOE Act, shall not be affected, and that orders shall be issued in such proceedings as if the DOE Act had not been enacted.

(TAPS) upon a finding of probable unlawfulness of the proposed rates.

2. Whether the ICC's Order, insofar as it authorizes the carriers to file new rates not exceeding specified amounts calculated under a known standard of reasonableness, a standard modified for the benefit of petitioners, constitutes a prescription or fixing of rates.

3. Whether the ICC can impose a refund condition in connection with both the originally filed tariffs placed under suspension and the interim rates authorized to be put into effect during the suspension period.

STATEMENT OF THE CASE

The facts of the case are set forth in the opinion of the Court of Appeals.[2]

ARGUMENT

The petitions for certiorari are based on an erroneous premise, namely, that the ICC prescribed or fixed, and the Court of Appeals upheld, "interim rates" for the pipeline carriers. The Commission did nothing of the sort. What it did do was to suspend, for a period of seven months, the rates filed by the carriers upon a showing by the protestants that those rates were probably unlawful. (App. C-4). The Commission's action was clearly within its statutory power and is supported by the plain language of Section 15(7), prior Commission decisions interpreting that section, and a comparison with other suspension clauses in the Interstate

[2]The opinion appears at Appendix A. Appendix references (hereinafter "App.") will be to the appendices to the Petition for Writ of Certiorari of Mobil Alaska Pipeline Company in No. 77-451, dated September 21, 1977.

Commerce Act as well as other statutes. It was an action which, as this Court has held in many cases, Congress intended to be exempt from judicial review.

To be sure, the ICC took the further step of indicating, for the guidance of the carriers, the parameters of interim rates which, if filed by the carriers, the Commission would not suspend. Absent such guidance, the carriers might have repeatedly filed tariffs which the Commission would have been required to repeatedly suspend until a rate level acceptable in the public interest was reached. That the Commission accompanied its suspension order with a clear and considered indication of an acceptable rate level did not change the essential nature of its action. It did not, as petitioners contend, thereby transform a *suspension* order into a *rate-fixing* order. Had the Commission merely suspended the tariffs originally filed, petitioners would concededly be out of court. It would be paradoxical, and would wholly frustrate the statutory allocation of responsibilities between the Commission and the courts, to hold that the guidance given the carriers by the Commission changed the character of the agency action here.

The Fifth Circuit carefully reviewed the decision of the Commission and agreed that the Commission does have the power to suspend initial rates and that its exercise of the suspension power did not result in a prescription of rates. There is no basis for concluding, as petitioners did, that the Fifth Circuit decision is in conflict with the decision of the District of Columbia Circuit in *Moss v. CAB*, 430 F.2d 891 (1970).

The decision below was in accord with the principles of judicial review of ICC suspension orders which have been reiterated in numerous decisions of this Court. Accordingly, for the reasons detailed below, further review is not warranted.

I. CONGRESS HAS GRANTED THE COMMISSION POWER TO SUSPEND INITIAL TARIFF RATES.

In suspending the initially proposed rates of the TAPS carriers, the ICC clearly acted within its statutory authority. The opinion of the Commission carefully discussed the question of its power to suspend initial rates and concluded that the plain language of Section 15(7) of the Act authorizes the action taken. (App. C-4, 5). As the Commission stated, Section 15(7) authorizes it to initiate a hearing concerning "any schedule stating a new individual or joint rate, fare, or charge," and, pending the hearing, to suspend the schedule for up to seven months. By suspending the initially filed TAPS rates for seven months, the Commission did precisely what Section 15(7) authorizes.

The term "new individual or joint rate" is unambiguous. A rate which has never been in effect is, literally, a new rate. Any possible doubt on this score has been removed by the Commission in its decisions. *Barge-Rail Coal From Huntington, West Virginia to Chicago District*, 315 I.C.C. 129 (1961) *aff'd per curiam sub nom., Chicago, Eastern Illinois R.R. v. United States*, 375 U.S. 150 (1963); *Bituminous Coal Via Motor-Rail From Lynnville, Indiana to Chicago, Illinois*, 313 I.C.C. 573 (1961); *Cotton from New Orleans*, 49 I.C.C. 751 (1918).

In *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo*, 321 I.C.C. 504 (1963), the Commission expressly stated that "initial" as well as "changed" rates were "new" rates within the meaning of Section 15(7):

> Of particular significance are the *express terms* found in sections 15(7) and 307(g). Each provide for suspension and/or investigation of "*** a new rate ***." [sic] *which encompasses both changed and initial.* However, each section places the burden of proof upon the proponent of only a 'changed' rate. 321 I.C.C. at 566 (emphasis added).

That long-standing administrative interpretation of the agency's authority has neither been rejected nor altered by Congress or this Court.[3] To construe Section 15(7) otherwise would create a huge gap in the regulatory scheme created by Congress because it would leave the Commission without any power to act on initial rates.

Evidence that Congress intended to make Section 15(7) applicable to initial rates can be found by comparing it with the suspension powers in other parts of the Interstate Commerce Act. Sections 216(g),[4] 218(c),[5] 307(g),[6] 307(i)[7] and 406(e)[8] contain suspension provisions identical to Section 15(7), except that they also include "grandfather" language making the suspension provisions inapplicable to certain "initial" rates filed on or before specified dates. Section 15(7) contains no such grandfather clause. Thus, as the Fifth Circuit noted, "if Congress had wished to exempt initial tariffs from the purview of Section 15(7), it would have done so specifically." (App. A-12).

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[3]Petitioners argue here, as they did before the Fifth Circuit, that the legislative history of Section 15(7) indicates that Congress did not intend that the Commission have the power to suspend initial rates. The Fifth Circuit found that this was not the case, stating that:

> The statutory history of the Mann-Elkins Act (1910), which added §15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates and no one seems to have debated or even discussed this specific question. *However, our examination of statutes modeled on §15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.* App. A-11 (emphasis added).

[4]49 U.S.C. §316(g).
[5]49 U.S.C. §318(c).
[6]49 U.S.C. §907(g).
[7]49 U.S.C. §907(i).
[8]49 U.S.C. §1006(e).

A comparison of the suspension sections in the Federal Communication Act[9] and the Civil Aeronautics Act[10] provides further evidence of an intent by Congress to grant the Interstate Commerce Commission power to suspend initial rates. The statutory language conferring the power of suspension upon these agencies by Congress is similar to Section 15(7) of the Interstate Commerce Act. In 1976 Congress amended the suspension section of the Federal Communication Act, making more explicit that the suspension power encompassed initial rates:

> Section 204 of the Act is in effect redesignated section 204(a) and is amended to extend from 3 to 5 months the period during which the Commission may suspend the operation of a tariff filing in whole or in part pending hearing on the lawfulness thereof. Other minor language changes in the subsection *clarify* that the provisions of the subsection are applicable to new as well as revised charges, classifications, regulations or practices. H.R. Rep. No. 1315, 94th Cong., 2d. Sess. 6 (1976) (emphasis added).

In contrast, Congress conferred upon the Civil Aeronautics Board a suspension power with an express proviso denying the Board the power to suspend initial rates. 49 U.S.C. §1482(g). Thus, it would appear to be Congress' understanding that, absent such an express proviso, the suspension power of 49 U.S.C. §1482, and Section 15(7) of the Interstate Commerce Act, would include the authority to suspend initial rates.

After examining various statutes modeled on Section 15(7), as well as the legislative policy underlying that section, the Court of Appeals rejected the carriers contention

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[9]47 U.S.C. §204(a).
[10]49 U.S.C. §1482(g).

that the Commission was powerless to suspend initial rates. (App. A-11).[11] It found that:

> Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. App. A-12.

The court's conclusion regarding the suspension power under Section 15(7), although obvious and important, is one that the petitioners have failed to address:

> The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme. App. A-12.[12]

II. A SUSPENSION ORDER OF THE INTERSTATE COMMERCE COMMISSION IS WITHIN THE SOLE DISCRETION OF THE COMMISSION

It is well settled that a decision of the Commission whether to suspend a proposed rate is committed solely to its discretion, and is a decision which is unreviewable by the courts. This Court has consistently held that Congress has withdrawn from the courts any jurisdiction to review, enjoin, or otherwise modify suspension Orders pursuant to

[11]Judge Roney in his dissent assumed without deciding that the Commission did have the power to suspend the initial rates. (App. A-19).

[12]Respondents emphasize that the suspension Order was issued *only after* an ICC finding that the proposed rates were probably unlawful:

> [W]e do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing or [sic] probable unlawfulness. App. C-4.

Section 15(7). *United States v. SCRAP*, 412 U.S. 669, 690-98 (1973) (*SCRAP* I); *Atchison, Topeka & Santa Fe v. Wichita Board of Trade*, 412 U.S. 800, 823 (1973); *Arrow Transportation Co., v. Southern Railway*, 372 U.S. 658, 62-68 (1963); *Board of Railroad Comm'rs v. Great Northern R. Co.*, 281 U.S. 412, 429 (1930).

In *Arrow* this Court, reviewing the ICC's suspension power, concluded:

> We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. This Court has previously indicated its view that the present section had that effect. In *Board of Railroad Comm'rs v. Great Northern R. Co.*, 281 U.S. 412, 429 Chief Justice Hughes said for the Court: 'This power of suspension was entrusted to the Commission only.' The lower federal courts have also said as much. And the commentators on the matter have consistently supported the soundness of that view. 372 U.S. at 667-68.

Later in *SCRAP I* the Court focused on the balancing of equities that led Congress to limit judicial intervention under Section 15(7):

> The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers. On the other hand, Congress was aware that if the Commission did not act within the suspension period, then the new rates would automatically go into effect and the shippers would have to pay increased rates that might eventually be found unlawful. To mitigate

> this loss, Congress authorized the Commission to require the carriers to keep detailed accounts and eventually to repay the increased rates if found unlawful. 412 U.S. at 697.

And, in *Atchison, Topeka & Santa Fe Railroad Company v. Wichita Board of Trade*, 412 U.S. 800 (1973), the Court stated:

> In giving the Interstate Commerce Commission power to suspend proposed rate increases, Congress allocated the benefit and harm of a suspension. 412 U.S. at 823.

Thus, as this Court has repeatedly held, the Congressional delegation of suspension power to the Commission is not subject to judicial review.

Congress clearly recognized that, for the limited suspension period, revenues might be lost to the carriers. However, by providing the Commission with the power to suspend, Congress balanced all interests and determined that a refund or reparation provision would not adequately protect the public interest in all cases. Here, the Commission determined that excessive rates would deprive the citizens of the State of Alaska, particularly the Arctic Slope natives, of funds presently required for public services such as education and medical treatment. Citizens deprived of such services will be irreparably injured since the retroactive funding of schools and medical services may well come too late for those most in need of the services. This is a particularly likely prospect in this case where the issues are complex and may take several years to finally resolve.

An additional factor supporting this conclusion is that judicial review would interfere with the primary jurisdiction of the Interstate Commerce Commission. In *Arrow* the Court stated:

> Our conclusion from the history of the suspension power is buttressed by a consideration of the undesirable consequences which would necessarily attend the survival of the injunction remedy. A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission, 372 U.S. 669-70 *See also SCRAP I*, 412 U.S. at 697 (citations omitted).

Acceptance of petitioners' arguments that an initial rate is not subject to a suspension order and, in any case, that the Commission cannot indicate any standard for refiling,[3] would result in a situation where every suspension order against a rate increase could and probably would be the subject of a petition for judicial review and a stay of the order. The suspension power of Section 15(7) of the Interstate Commerce Act would be rendered a nullity and the courts would be flooded with suits to review, enjoin, annul and set aside the thousands of suspension orders entered each year under the authority conferred by the Interstate Commerce Act.

In light of the emphatic and repeated holdings of this Court that there should be no judicial interference with Commission suspension proceedings, petitioners' claims

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[3] See Section III, pp. 12-18, *infra*. Commission suspension orders, including the order under review here, normally include stated reasons for the suspension and, in addition, sometimes reference an acceptable standard.

regarding the suspension power do not raise any new questions meriting further review.

III. THE COMMISSION'S SUSPENSION ORDER DID NOT PRESCRIBE OR FIX RATES

A. There Is No Conflict Between The Fifth And District of Columbia Circuits

Petitioners contend that the Fifth Circuit's decision here is in conflict with the District of Columbia Circuit's decision in *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). However, both the Commission's opinion (App. C-6) and that of the Fifth Circuit (App. A-14) gave careful consideration to *Moss*. Both concluded that *Moss* was readily distinguishable and not applicable.

In *Moss* the CAB had attempted, in effect, to prescribe rates of a permanent nature without the benefit of a full hearing. Further, it had attempted to do so by setting forth a *new* tariff formula, and, compounding the problem, it had done so after substantial *ex parte* contacts with those standing to benefit from the new formula. The court stated: "We are dealing with a complete and innovative scheme for setting all passenger rates for the continental United States," adding that "it set forth a step-by-step formula requiring *major changes* in ratemaking practices and in rates which it expected carriers to adopt." 430 F.2d at 899 (emphasis added).

The present case is not similar to *Moss* in several respects. This case is concerned with tariffs of a seven-month temporary nature, not permanent tariffs.[14] Second, the temporary tariff levels were calculated on the basis of a traditional ICC methodology, not on the basis of a new,

[14]The investigation before the Federal Energy Regulatory Commission, OR78-1, which will ultimately determine the level of lawful rates, is in its initial stages.

particularized formula. And, finally, there were no improper *ex parte* contacts between the Commission and any parties.

B. The Commission Was Not Precluded From Indicating Acceptable Rates For The Guidance of Carriers

Petitioners assert that the Commission acted illegally in prescribing or fixing rates without complying with the full hearing requirement of Section 15(1).[15] Their argument only begs the question. The issue is, of course, whether the Commission's action was, in fact, a fixing or prescription of rates, i.e., a determination of the just and reasonable rates to be charged for the future.

As the Fifth Circuit pointed out, the Commission could have simply suspended the rates. (App. A-12-15). Had the Commission done so, there would have been no basis for any claim that it prescribed new rates. The claim that the ICC fixed interim rates has arisen solely because the Commission included in its opinion a discussion of its traditional permitted standard for pipeline rate of return. Having found that the carriers' proposed tariffs far exceeded the traditional standard, even when the standard was modified to permit a higher rate of return, the Commission suspended the tariffs. (App. C-4).

[15]References are also made by the petitioners to the fact that no formal evidentiary record was made prior to the suspension, the implication being that the Commission made its decision without sufficient information. Of course, under Section 15(7) no such record is necessary. However, the Fifth Circuit decision points out the special procedure the Commission followed to ensure that the issues would be fully considered (App. A-5, n. 8), and the extensive information that was before the Commission (App. A-5, n. 8a.). Clearly, the carrier proposed rates were given extraordinary consideration, much more so than would have occurred had the usual Commission suspension procedure been followed.

In order to provide guidance to the carriers in regard to any future filings, the Commission took the simple further step of mathematically applying its liberalized standard to each individual carrier, setting forth maximum rate levels that the Commission would allow to go into effect without a further suspension. It is untenable to claim that the Commission thereby prescribed or set rates, and thus transformed the suspension order into an unlawful prescription of rates. Certainly, the basic considerations of public policy precluding judicial review are no less applicable to a suspension order which contains such helpful, time-saving guidance to the carriers, thereby avoiding unnecessary and numerous future filings.

It should be emphasized that the Commission made no judgments as to the costs claimed by the carriers. To the contrary, the Commission accepted *all* of the pipelines' claimed costs, including: (1) all operating expenses, regardless of amount or to whom paid; (2) all depreciation expenses, reflecting a recovery of the entire cost of construction over an abbreviated "economic life" of only 25 years[16]; (3) all removal costs as estimated by the TAPS carriers, without modification, similarly recovered over a shortened life of only 25 years[17]; (4) all annualized interest

[16]This is a substantially shorter period than the anticipated service life of the pipeline. Bonds for the project generally are being financed on a thirty-year basis. If any oil is found anywhere in Alaska, on shore or offshore, which would be tributary to the TAPS system, it would, of course, lengthen the economic life of TAPS. The U.S. Geological Survey estimates that there is a 95% probability that there are at least 9 billion more barrels of undiscovered but recoverable crude oil reserves in Alaska. Geological Estimates of the United States, Geological Survey Circular 725, Table 4, pp. 28-29.

[17]Removal costs were estimated in a study for Alyeska Pipeline Service Company, the TAPS carriers' agent, at $1.049 million in 1977 dollars. These costs were amortized over 25 years without any increase for inflation or any decrease for the earning capacity of the fund being generated. Order of June 28, 1977 (App. C-18).

costs alleged by the TAPS carriers to be incurred in connection with the debt financing of the cost of construction (including the capitalization of interest charges during construction)[18]; (5) collection of inferred or imputed sums sufficient to pay both federal (48 percent) and state (9.4 percent) income taxes;[19] (6) an allowance for a return on the equity for each of the pipelines in amounts ranging from 50.7 cents to 85.5 cents per barrel.[20]

By not challenging any of the carriers' cost figures, the Commission gave the carriers the benefit of doubt in all cases. The Commission's standard of reasonableness, therefore, was applied solely to unchallenged costs, and, even then, the proposed tariffs were found to permit a return far exceeding the level permitted under the standard. The result was the suspension order.

[18]Interest expenses will be adequately covered by the Commission's allowance of a ten percent (10%) return on "valuation". ICC "valuation" *exceeds* the original cost or investment by almost one-half billion dollars ($9,733,600,000 versus $9,268,475,000). (App. C-18, 19). Since, on the average, TAPS is at least 85 percent debt financed, coverage of the cost of capital on 85 percent of the investment is assured by the payment of interest costs.

[19]There has been no showing by the TAPS carriers that such income taxes, if any, will actually have to be paid. An imputed tax allowance creates a cash flow available to the carrier at no cost until the time, somewhere in the indefinite future, when deferred taxes might have to be paid. *See, The Second National Natural Gas Rate Case,* ____ F.2d ____ (D.C. Cir. 1977); *Memphis Light, Gas & Water Div., v. FPC,* 500 F.2d 798 (D.C. Cir. 1974); *People of the State of California v. FPC,* 506 F.2d 228, 232-33 (D.C. Cir. 1974).

[20]The additional return of 72 cents per barrel to Mobil Alaska Pipeline Company, which has no equity according to all figures made available to the Commission, thereby results in an infinite percentage return to Mobil on its equity. The equity returns vary on a percentage basis from 13.30 percent for Amerada Hess up to 54.25 percent for ARCO.

C. This Court's Decision In *Chesapeake* Supports The Commission's Power To Authorize Specific Interim Rates

By authorizing the filing of interim rates not exceeding certain maximum levels based on the Commission's liberalized standard of unlawfulness, the Commission's order "was directly related to its mandate to assess the reasonableness of the rates and to suspend them pending investigation if there is question as to their legality." *United States v. Chesapeake & Central Ohio R. Co. (Chessie)*, 426 U.S. 500 (1976). As this Court said in *Chessie:*

> The ICC could have simply suspended the rates originally proposed by the railroads for the full statutory 7-month period. Instead, it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented. 426 U.S. 514.

Under Section 6(7) of the Interstate Commerce Act, the carriers could not lawfully operate without having tariffs on file.[21] On the other hand, while the rates as filed were properly suspended because of probable unlawfulness, there was a level of rates which, at some point, would be reasonable and would be permitted to be put into effect. The question in this case, as it is in every one of the thousands of suspension cases each year, is what level the Commission would permit to be put into effect. The Commission could have left the carriers to their own devices to discover, by repeated sequential filings, what that level would be. Such a procedure would have been burdensome, time-consuming and not to the advantage of anyone, including the pipelines. To avoid the necessity of such a burdensome and time consuming process, the Commission's "measured course . . . tailored precisely to the particular

[21] 49 U.S.C. §6(7).

circumstances presented",[22] was to indicate maximum interim rate levels which would be authorized. The result was to the benefit of all parties before the Commission, and did not change the suspension order into a rate fixing order.

The Commission clearly explained its reasons for suggesting maximum permitted rate levels:

> We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest. App. C-6, 7.

Petitioners do not argue that the Commission lacked the power to permit interim rates to go into effect during the suspension period, but argue that the Commission did not have the power to announce in its suspension order the maximum levels of the interim rates which it would be willing to accept without suspension. However, an authorization of "interim rates not exceeding" specified amounts, contained within a suspension order, is not a "prescription" of rates which would be valid, under Section 15(1)[23] of the Act, only "after full hearing."

In contrast to *Arizona Grocery Company v. Atchison Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 386 (1932), the Commission did not here "declare a specific rate to be the reasonable and lawful rate for the future." Here, the interim rates are the subject of continuing "scrutiny" or in-

[22] *United States v. Chespeake & Ohio R. Co.*, 426 U.S. at 514.

[23] 49 U.S.C. §15(1).

vestigation and possible refund or reparation. This alone indicates the interim rates were not considered to be prescribed by the ICC. In fact, the Commission specifically stated that "such rates if filed, remain subject to Commission scrutiny and are not to be considered as prescribed within the meaning of the decision in *Arizona Grocery v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370." (App. C-6). The interim rates are not in effect or prescribed for the future because they will expire at the end of the suspension period.

IV. THE "KEEP ACCOUNT" REFUND PROVISION REQUIREMENTS OF THE ICC ORDER DO NOT WARRANT REVIEW.

Petitioners argue that the Commission's refund provisions which apply to both the initial rates and the interim rates are beyond the statutory powers of the ICC. This contention neither raises a substantial question of law nor involves a present case or controversy. The "refund provision" required by the ICC order does not have any present effect on any rights of the parties because it is entirely prospective and conditional. No obligation arises under the refund provision unless and until there is a finding at a later date that the rates collected exceed the rates which are ultimately authorized, approved or prescribed.[24]

There has been no final determination by the ICC that either the initial rates or the interim rates exceed a maximum, just and reasonable rate. That determination is the subject matter of the pending investigation. Accordingly, at this time, there is no present case or controversy over the amount of any refund which ultimately might have to be paid.

At present, the refund provision is no more than a "keep account" order requiring the carriers to maintain records of the amounts collected under the tariffs and from whom they are collected. Such an order is not restricted by the

[24] *See*, ICC Order of June 28, 1977 (App. C-15, 16).

refund language of Section 15(7). The Commission has broad powers under Section 20 of the Interstate Commerce Act to require the maintenance of special accounts. That section provides:

> The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers and their lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. 49 U.S.C. §20(5).

In other cases, this Court has upheld the Commission's broad authority to require the keeping of accounts and records. *See, e.g., Norfolk & Western Ry. v. United States*, 287 U.S. 134 (1932); *Kansas City Southern Ry. Co., v. United States*, 231 U.S. 423 (1913); *I.C.C. v. Goodrich Transit Co.*, 224 U.S. 194 (1912). Thus, there should not be any substantial question as to the propriety of the Commission's exercise of similar authority in its suspension order.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

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